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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-567

JEFFREY RICHARD ROBBINS,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, filed on May 9, 1978, and amended on May 22, 1978, is appended to the Petition for Writ of Certiorari.[1]

[1]An earlier unpublished opinion filed on June 30, 1976, by the Court of Appeal, First Appellate District, Division Four, was vacated by that court by order filed July 22, 1977, and petitioner's appeal reinstated for further briefing and oral argument. Petitioner sought review of the earlier opinion by petition for writ of certiorari filed in the United States Supreme Court on December 14, 1976 (No. 76-817). A response to the petition was filed by the People of the State of California, following which the Court denied the petition.

On July 5, 1978, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

Petitioner would invoke this Court's appellate jurisdiction under Title 28, United States Code sections 1257 and 2101. Jurisdiction is conferred by Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Was the Pre-*Chadwick* warrantless search of petitioner's automobile and its contents, made on the highway in the early morning, justified by probable cause?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments Four and Fourteen, section 1.

STATEMENT OF THE CASE

The District Attorney of Solano County accused petitioner Jeffrey Robbins of possession, possession for sale, and transportation of marijuana and driving under the influence of a drug, by an information filed on January 23, 1975 (CT 8-9).[2] Petitioner pleaded not guilty (CT 11), was

[2]"CT" refers to the Clerk's Transcript on Appeal; "RTS" refers to the Reporter's Transcript of the Suppression Hearing; "RT" refers to the Reporter's Transcript of trial proceedings. "PHT" refers to the Preliminary Hearing Transcript which was also considered by the court at the suppression hearing.

tried by a jury (CT 13), and convicted of possession, possession for sale, and transportation of marijuana, but acquitted on the remaining charge (CT 48-49).

Proceeding eastbound on Interstate Route 80 at 1:45 a.m. on January 5, 1975, California Highway Patrol Officer DePue noticed petitioner driving in the same direction along parallel Nelson Road (RTS 4-5). As DePue observed petitioner at a distance of about one tenth of a mile (RTS 5), Robbins twice crossed the center line of the roadway (RTS 6). Approaching a curve, petitioner's automobile drifted into the oncoming lane the full width of the vehicle, its right wheels reaching the center line (RTS 6). Robbins returned his auto to the right side of the road but while negotiating the curve drifted three feet across the center line (RTS 6-7). DePue also noted that petitioner was driving 30 miles per hour in what DePue thought was a 55 miles per hour zone (RTS 6). Judging petitioner's driving to be erratic, DePue and Sergeant Stoltz followed and stopped him "to determine why it had left—was operating outside of a marked road lane" (RTS 7).

Petitioner immediately alighted, meeting DePue midway between their vehicles (RTS 8). The officer asked for Robbins' operator's license and ownership registration (RTS 9).[3] Petitioner, perspiring profusely, swallowing rapidly,

[3]California Vehicle Code section 4454 requires owners to maintain the registration or a facsimile in their vehicle. Vehicle Code section 2804 authorizes California Highway Patrol officers, "upon reasonable belief that any vehicle is being operated in violation of any provisions of this code" to "require the driver of the vehicle to stop and submit to an inspection of the . . . registration card." Vehicle Code section 12951 obliges a driver to carry his license while driving and to present it upon demand of a peace officer enforcing traffic regulations.

his eyes bloodshot and watery, experienced difficulty in removing the license from his wallet (RT 39-40). When Robbins opened his car door to retrieve his registration, DePue, standing three to four feet behind him, smelled the familiar odor of burned marijuana within the vehicle (RTS 9-10; RT 40-42). The officer also noted smoke in the car's interior (RT 43).

DePue then pat-searched Robbins for weapons (RT 42; RTS 10), finding only a vial of a malodorous liquid (RTS 11; RT 43). DePue next entered the passenger compartment to recover a pair of tweezers observed on the front seat (RT 43, RTS 12). The patrolman previously had observed such devices used to hold marijuana roaches (RT 43). After Robbins vomited (RT 44; RTS 12), DePue reentered petitioner's auto and found two pairs of tweezers on the dashboard, one with a burned hand rolled cigarette butt, and a cookie tin on the rear floor (RT 44-45, 47). Inside the tin were two packs of cigarette papers and a plastic baggie containing marijuana (RT 48, 145).

While Officer DePue searched the passenger compartment, petitioner remarked to Sergeant Stoltz "What you are looking for is in the back" (RT 120). Stoltz repeated this to DePue. Robbins was placed in the patrol vehicle while DePue unlocked the tailgate of Robbins' station wagon, raised the floorboard and removed two marijuana bricks and a tote bag containing some 30 pounds of marijuana (RT 50-53, 140). The bricks were wrapped in green plastic (PHT 24). The bricks attracted DePue's attention because he had heard contraband was wrapped and transported in this manner (PHT 24). Inspector Grundy of the

Solano County Drug Abuse Bureau placed the street value of the seized contraband at approximately $8,000.00 (RT 190), a quantity sufficient to supply an individual user for 17 years (RT 189).

About ten minutes after the contraband was discovered Robbins was advised of his *Miranda* rights (RTS 21; RT 58). He was not interrogated by the arresting officers (RT 58). Prior to the admonition petitioner told DePue he did not wish "to take a fall for this" (RT 58), and asked Stoltz what it would take "to get out of this?" The sergeant replied that disposition would follow booking. Robbins said, "In my left pocket, check it." Petitioner's left pocket contained $521.00 (RT 122).

Petitioner testified that earlier that day he had met a woman, known to him only as Carol, who offered to pay him $500 to drive her to Los Angeles that evening (RT 274). She refused to tell him the purpose of the trip (RT 274). Petitioner nevertheless accepted the offer and the two embarked on their journey that evening. Petitioner explained the woman's absence from the car at the time of his arrest as the result of a previous disagreement between the two of them concerning directions and her use of marijuana in the car (RT 74). He testified that she exited petitioner's vehicle somewhere in Walnut Creek, leaving behind approximately 37 pounds of contraband which, unknown to petitioner, she had previously hidden in the car (RT 257, 295). She never advised petitioner of her last name nor did she give him an address or number where she could be reached (RT 292).

ARGUMENT

I

THE WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE AND THE CONTENTS WAS JUSTIFIED BY PROBABLE CAUSE.

Petitioner contends that the search of his automobile baggage compartment and of packages found inside it violated the Fourth Amendment. He does not complain that the highway patrolman lacked probable cause; the search followed their observation of his physical condition, their noting the odor of marijuana and smoke in the passenger compartment, their discovery of what appeared to be roach-holders near the front seat and Robbins' remark "what you are looking for is in the back." Petitioner insists, however, that the officers' failure to secure a warrant is inexcusable and that the 1:45 a.m. on-the-scene search cannot be justified by the "automobile exception" to the warrant requirement. Petitioner finds *United States v. Chadwick*, 433 U.S. 1 (1977), to be controlling (Pet. 9). His contention must fail because *Chadwick* is inapplicable. The Court there condemned the warrantless search of a double-locked 200 pound footlocker seized immediately after it had been placed in Chadwick's vehicle and searched 90 minutes later after its removal to a federal building and the arrest of its possessors. The Court explained:

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15.

Petitioner reasons that *Chadwick* should also control "in cases of properly stopped vehicles in transit which contain in closed compartments luggage and sealed packages, items securely 'closed against inspection,' under circumstances where it is reasonable to have 'an expectation that their contents would remain free from public examination' " (Pet. 11). However, *Chadwick* did not decide that question. Instead, the Court emphasized that "the Government does not contend that the footlocker's brief contact with Chadwick's car makes this an automobile search . . . ." 433 U.S. at 11.

The People do contend that luggage discovered in a transporting vehicle falls within the "automobile exception" and, upon probable cause, is subject to an on-the-scene warrantless search. *A fortiori*, the exception encompasses packages not secured by any lock. The "automobile exception" is based upon the mobility of vehicles, itself an exigent circumstance, *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *People v. Laursen*, 8 Cal.3d 192, 201, 104 Cal.Rptr. 425, 431, 501 P.2d 1145, 1151 (1972), and the reduced expectation of privacy one enjoys in an automobile, *United States v. Chadwick*, 433 U.S. at 12; *People v. Dumas*, 9 Cal.3d 871, 882-883, 109 Cal.Rptr. 304, 311-313, 512 P.2d 1208, 1215-1217 (1973). Recognition of a greater expectation of privacy in personal property than in the vehicle in which it is stored or transported is neither logical nor consistent with actual expectations based upon common experience.

Decisions rendered before and after *Chadwick* confirm our view. *People v. Vermouth*, 20 Cal.App.3d 746, 757, 98 Cal.Rptr. 65, 71 (1971), ruled that "it was permissible to

search at the place or arrest and as incident thereto every part of the vehicle and any closed containers within it for weapons or contraband." *Vermouth* relied upon *Chambers*, which approved a thorough auto search extending to a compartment beneath the dashboard. 399 U.S. at 44. Federal appellate courts have reached the same result. *E.g.*, *United States v. Giles*, 536 F.2d 136, 139-140 (6th Cir. 1976); *United States v. Canada*, 527 F.2d 1374 (9th Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1104 (2d Cir. 1975); *United States v. Anderson*, 500 F.2d 1311, 1315 (5th Cir. 1974); *United States v. Evans*, 481 F.2d 990, 994 (9th Cir. 1973). Especially instructive is *United States v. Soriano*, 497 F.2d 147 (5th Cir. 1974) (en banc), *reaffirmed sub. nom. United States v. Aviles*, 535 F.2d 658 (1976). Sitting en banc, the Fifth Circuit there unanimously upheld an on-the-scene warrantless search of a suitcase removed from the trunk of a taxicab. 497 F.2d at 147. *Soriano* recognized that a different rule might apply were the luggage first removed from the scene, 497 at 150 n. 6, but nevertheless upheld on-the-scene searches. In short, the *Chadwick* rule, assumed in *Soriano*, made no difference.

Post-*Chadwick* federal decisions do conflict. In *United States v. Stevie*, 582 F.2d 1175 (8th Cir. 1978) (en banc) it was held that, although, pursuant to the "automobile exception" officers could legitimately immobilize a station wagon and seize suitcases located in the rear, *Chadwick* barred a warrantless search of an arrestee's luggage absent exigent circumstances. 582 F.2d at 1178-1179. The court reasoned that an individual's legitimate expectation that the contents of his luggage will remain free from public examination remains present whether the luggage is lo-

cated inside or outside an automobile. 582 F.2d at 1179. The requirement that a warrant be obtained under *Chadwick* was held to be triggered once officers obtained exclusive control over the luggage. *Id.*

The Ninth Circuit, however, in *United States v. Finnegan*, 568 F.2d 637 (9th Cir. 1977), points out that *Chadwick* "did not substitute a test of expectation of privacy for probable cause." 568 F.2d at 641. Noting that the Supreme Court did not address the tests for, or scope of, the automobile search exception because those issues were not before it, the Ninth Circuit expressed the following view with respect to the scope of the *Chadwick* decision:

> "*Chadwick* lays down a rule whereby courts faced with an invitation by the government to define a new class of objects which may be searched without a warrant must consider whether there is a diminished expectation of privacy with respect to that *class* of objects." 568 F.2d at 641.

It was held in *Finnegan* that *Chadwick* does not apply where there is probable cause to search luggage located in an automobile and exigent circumstances exist because the automobile containing the luggage can be moved. *Id.* The court recognized that the application of *Chadwick* to automobile exception cases would lead to inconsistent and contradictory results.

> "For instance, a police officer could search and seize a brick of marijuana lying inside the trunk of a car but not a brick of marijuana lying inside a suitcase in the trunk of a car." *Id.*

The *Finnegan* decision accurately defines the scope of the *Chadwick* holding. Unlike the decision in *Stevie*, *Finnegan* acknowledges and graphically describes the inconsistencies

and contradictions which would flow from grafting *Chadwick* onto the automobile search exception rule of *Chambers*.

Chadwick does not erode the California rule authorizing a warrantless search of an automobile and its contents where "(1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search." *People v. Dumas*, *supra*, 9 Cal.3d 871, 884, 109 Cal.Rptr. 304, 314, 512 P.2d 1208, 1218.

Probable cause existed for searching both Robbins' vehicle and his packages. *Cf. Wimberly v. Superior Court*, 16 Cal.3d 557, 567-568, 128 Cal.Rptr. 641, 647-648, 547 P.2d 417, 423 (1976). The facts which furnished probable cause were not foreseeable by the searching officers. *Contrast Chambers v. Maroney*, 399 U.S. at 51, with *United States v. Chadwick*, 433 U.S. at 3-4, and *Coolidge v. New Hampshire*, 403 U.S. 443, 471 n. 29 (1971) ("we deal here with a *planned* warrantless seizure"). It was impractical to seek a warrant at 1:45 a.m., when Robbins' auto was out on the highway. "Reason and good police procedure dictated that if the officers were to preserve the evidence of illegal activity which their investigations had uncovered, an on-the-scene search of the vehicle was mandated." *People v. Cook*, 13 Cal.3d 663, 669, 119 Cal.Rptr. 500, 503, 532 P.2d 148, 151 (1975).

Moreover, *Chadwick* involved a double-locked footlocker. There is a constitutional difference between unlocking a secured container and unwrapping a package, opening a cookie tin, or looking into a plastic baggie, as occurred here. That difference reflects varying actual expectations of privacy manifested by distinct modes of concealment.

II

PETITIONER'S FAILURE TO OBJECT AT TRIAL ON THE PRESENT GROUND COMPELS REJECTION OF HIS CLAIM HERE.

Petitioner made no objection to the introduction of the seized evidence at either the suppression hearing or trial on the ground he raises here. His failure to object compels rejection of his petition.

First, if *Chadwick* does no more than re-state existing Fourth Amendment principles as held by the Eighth Circuit in *United States v. Schleis*, 582 F.2d 1166, 1173 (8th Cir. 1978), petitioner's failure to show cause why no objection was made in the trial court bars review of the issue here. *Wainwright v. Sykes*, 433 U.S. 72, 86-87 (1977).

Second, were *Chadwick* held to have silently overruled *Chambers*, as well as countless state cases such as *Cook* and *Vermouth*, it would not avail petitioner. *Chadwick* was announced on June 21, 1977. The search questioned here occurred January 5, 1975. At the time of this search both federal and state courts believed such searches to be lawful under *Chambers*. *See e.g. United States v. Giles*, *supra*, 536 F.2d 136; *United States v. Canada*, *supra*, 527 F.2d 1374; *United States v. Tramunti*, *supra*, 513 F.2d 1087; *United States v. Soriano*, *supra*, 497 F.2d 147; *People v. Vermouth*, *supra*, 20 Cal.App.3d 747, 98 Cal.Rptr. 65. To use this case as a vehicle to overturn *Chambers* would be to afford petitioner a windfall contrary to this Court's decisions denying retroactivity to new restrictions on searches and seizures. *See United States v. Peltier*, 422 U.S. 531, 535-542 (1975); *Desist v. United States*, 394 U.S. 244, 249-

254 (1969). If, indeed, it is presently unclear whether *Chadwick* applies to automobile searches, it is doubly so with respect to searches conducted prior to *Chadwick*. The Seventh and Ninth Circuits' rejection of the retroactive application of *Chadwick* is compelled. *United States v. Choate*, 576 F.2d 165, 182, n. 20 (9th Cir. 1978); *United States v. Berry*, 571 F.2d 2, 3 (7th Cir. 1978).

The failure of petitioner to raise this specific issue at trial has left the record less than clear in several material respects. First, the trial court made no finding concerning petitioner's consent to search. Indeed, given *Chambers* and the state of existing law, no determination was necessary concerning consent. Had petitioner advanced a theory that the warrantless search was unlawful because it breached his right to privacy, a further evaluation of consent would have been necessitated. A finding of consent would have barred any consideration by this Court of the issue now presented.

In addition, although the record indicates that entry into the back of the station wagon was achieved by unlocking the tailgate, presumably the officers had access to the back by entry through the unlocked front doors of the vehicle.[4] Another matter which most certainly would have been developed had a *Chadwick*-type objection been made, was whether the plastic-wrapped bricks constituted, in fact, contraband in plain view. Officer DePue testified that his attention was drawn to the bricks because he had heard

[4]The fact that the officer entered the back of the station wagon by unlocking the tailgate did not come to light at all during the pre-trial suppression proceedings, but was first revealed at trial (RT 50).

that contraband was packaged and transported in this manner (PHT 4). A finding that the bricks were contraband in plain view would render petitioner's argument with respect to the tote bag harmless beyond a reasonable doubt. *Chapman v. California*, 384 U.S. 18, 24 (1967). Thus, the absence of any pre-trial or trial objection by petitioner to the admission of seized evidence on the present ground, requires rejection by this Court of this petition for a writ of certiorari.

CONCLUSION

While a split of authority among circuit courts on the question whether *Chadwick* modifies *Chambers* might tempt this Court to grant certiorari in this case, the failure of petitioner to object to the admission of evidence at trial on the ground advanced here and the resultant deficient state court record compels otherwise. While no specific findings were made by the trial court, the state of the evidence is such that had an objection been made a rejection thereof would have been appropriate because petitioner consented to the search and Officer DePue found the marijuana bricks in plain view.

The search in this case occurred almost two and a half years prior to the *Chadwick* decision. This Court's previous rejection of retroactive application to new restrictions on searches mandates dismissal of this petition. To grant the petition is to afford petitioner a windfall clearly contrary to all this Court's decisions denying retroactivity. And, even if *Chadwick* does not state a new restriction upon searches, petitioner has not shown cause why no objection

was made in the trial on the ground asserted here. His failure to do so bars review of the issue by this Court under *Wainwright.*

Dated, December 8, 1978.

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